STATE OF MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Family Day Care License of Corrine and Paul Abraham. FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION

The above-entitled matter came on for hearing before Richard C. Luis, Administrative Law Judge, on November 15 and 19, 1985 at the Conference Room

of the Anoka County Courthouse in Anoka, Minnesota.

Marcy S. Crain, Assistant Anoka County Attorney, Anoka County Attorney Office, Anoka County Courthouse, Anoka, Minnesota 55303, appeared on behalf of

the Anoka County Community Health and Social Services Department (hereinafter

"Agency"). Patrick W. Ledray, Katz, Lange, Davis and Manka, Ltd., 555 Peavey

Building, 730 Second Avenue South, Minneapolis, Minnesota 55402, appeared on

behalf of Paul and Corrine Abraham (hereinafter "Licensees"). The record in

this matter closed on February 12, 1986, after receipt of post-hearing memoranda from the parties.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final

decision of the Commissioner of Human Services shall not be made until this Report has been made available to the parties to the proceeding for at least

ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner of Human

Services. Exceptions to this Report, if any, shall be filed with Leonard $\ensuremath{\mathtt{W}}.$

Levine, Commissioner, Minnesota Department of Human Services, 4th Floor, Centennial Office Building, 658 Cedar Street, St. Paul, Minnesota 55155.

STATEMENT OF ISSUE

The purpose of the hearing is to determine whether Licensee Paul Abraham

violated the provisions of Minn. Rules part 9545.0340 (1983), and if so, whether the Licensees' Family Day Care (FDC) License should be revoked.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

- 1. Paul and Corrine Abraham were first licensed in 1981 to provide family day care. There have been no complaints filed regarding the quality of day care that has been provided.
- 2. L.N., born December 22, 1967, lives next door to the Abrahams in Columbia Heights. In 1982, she began babysitting for the Abrahams' two young children on a regular basis.

3. on November 18, 1983, L.N. went to the Abrahams' home at about 8:30 p.m. Corrine Abraham had already left with a friend, and did not return until

about 12:30 a.m. She did not call home during the course of the evening to check on her children, because no plans had been made to have a babysitter come in. Paul Abraham was going to spend the night with their children. L.N.'s mother, J.E., noted that Paul Abraham was at the home at 9:30 p.m.,

she called L.N. to ask why she was still in the Abraham home. Paul Abraham answered the phone and L.N. then spoke with her mother. Mr. Abraham left the

home shortly after the phone call and returned to the house between 10:30 and

11:00 P.M.

4. On November 18, 1983, L.N. and Paul Abraham participated in a sexual encounter in which Mr. Abrahams' finger penetrated L.N.'s vaginal area. $_{\mbox{\scriptsize L.N}}$

was 15 years old and Mr. Abraham was 30 years old on that date. Paul Abraham

was born December 22, 1952, exactly 15 years earlier than L.N. At all times relevant herein, Paul Abraham was aware of L.N.'s age.

- 5. On the morning of December 23, 1983, Corrine Abraham went to a Christmas party for day care children at a meeting hall in Columbia Heights. John Banker (Licensees' witness), Paul Abraham and L.N, were all at the Abrahams' home on the same morning.
- 6. On December 23, 1983, the day after L.N.'s sixteenth (and Mr. Abraham's thirty-first) birthday, she and Paul Abraham engaged in an act of sexual intercourse with each other in the Abraham house.
- 7. On November 12, 1984, D.E., L.N.'s stepfather, read her personal diary, and was concerned with two different entries that indicated that his stepdaughter might have a sexual relationship with Paul Abraham. J.E. and her

husband asked Corrine Abraham to come over, and they confronted her with the diary information.

8. Later on November 12, 1984, Paul Abraham and D.E. got into a physical

fight regarding the entries in L.N.'s diary. The Columbia Heights $% \left(1\right) =\left(1\right) +\left(1\right) +$

called to break up the fight.

- 9. On November 14, 1984, Shirley Rose reported suspected child abuse in accordance with the Minnesota Mandatory Child Abuse Reporting Act, Minn. Stat.
- 626.556 (1984). Corrine Abraham had seen Shirley Rose on a professional basis for therapy. During the lone session between the two, Mrs. Abraham told

Ms. Rose that she suspected her husband had a sexual relationship with L.N. after Mr. and Mrs. E. showed her their daughter's diary.

10. L.N. did not voluntarily approach the police with a report of sexual

abuse. The report was made as a result of the Minnesota Mandatory $\,$ Child Abuse

Reporting Act, and the subsequent action of the police.

11. On November 20, 1984, Detective Dan Cooper and Investigator $\,\mathrm{G}.\,$ Kreyer

of the Anoka County Major Crime Inspections Unit went to L.N.'s high school to

question her about the suspected child abuse. L.N. stated to the investigators that she had been "talked into" two sexual ercounters with Paul

Abraham on November 18 and December 23, 1983.

12. On February 10, 1984, L.N. was babysitting for the Abrahams. The

Licensees returned home unexpectedly, found L.N. under a blanket on the couch.

and a boy hiding elsewhere in the room. L.N. was not allowed to babysit for them after this date because she did not inform her parents of the incident as

the Abrahams insisted that she must.

13. At a Prehearing Conference on October 1, 1985, conducted by Administrative Law Judge Peter C. Erickson, the parties stipulated that the $\frac{1}{2}$

rule alleged to have been violated is found at Minn. Rule 9545.0340 (1983 Codification). Judge Erickson noted this Rule in his Prehearing Order issued on October 2, 1985.

14. Two pages from L.N.'s diary were copied by the Administrative Law

Judge and admitted into evidence (Respondent's Ex. 11 and 12). The entry for November 18, 1983 reads, in its entirety:

Dear diary, tonight I had to babysit the Abrahams next door, Paul came home at 10:37, for the first time we made love. Yes, it was my first time. He knew that and said he would go slow. I was absolutely beautiful.

15. The entry in L.N.'s diary for December 23, 1983 reads, in its entirety:

Dearest D, today, (actually night), I truly made love. Last time was the same way, just a sample of it. This was the whole package. It felt so good to have him against me like that. Also, I got my ears pierced. But the best part of today was making love to P.C.

- 16. L.N., concerned that her step-father might read her diary, used the notation "P.C." to conceal the actual initials of the person referenced in the above Finding.
- 17. On June 5, 1985, Anoka County notified the Abrahams of the pending

revocation of their day care license by the Minnesota Department of Human Services, pursuant to Minn. Stat. 245.801, subd. 4 (1984). The Licensees

duly appealed and this hearing process followed.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction in this matter and authority to take the action proposed

pursuant to Minn. Stat. 245.801, subd. 4 and 14.50 (1984), and Minn.
Rule
9545.0340A (1983).

2. The Notice of and Order for Hearing in this case was proper, and all $% \left(1\right) =\left(1\right) +\left(1\right) =\left(1\right) +\left(1\right) +\left(1\right) =\left(1\right) +\left(1\right) +\left($

relevant substantive and procedural requirements of law or rule have been satisfied except that there was an error in Exhibit A as attached to the Notice concerning the burden of evidence required and the cited rule section

A stipulation was arrived at at an October 1, 1985 Prehearing Conference, and Administrative Law Judge Peter C. Erickson issued a Prehearing Order stating

that the rule alleged to be violated by the Licensees was Minn. Rule 9545.0340

(1983), requiring substantial evidence of child abuse for a Family Day Care License not to issue.

3. Minn. Stat. 245.801, subd. 4 (1984), provides that upon a demonstration by a local welfare agency that reasonable cause exists to take the action proposed with respect to a Family Day Care License, the burden of proof then shifts to the Licensees to demonstrate compliance with the rule by a preponderance of the evidence; the local agency demonstrated reasonable cause to revoke the Abrahams' license because of non-compliance with Rule 9545.0340 (1983) because there is substantial evidence of child abuse or child

molesting. Upon that demonstration of reasonable cause, the burden of proof shifted to Licensee to demonstrate compliance with the Rule by a preponderance

of the evidence.

4. The Licensees have not shown by a preponderance of the evidence that there was not an incident of child abuse or child molesting on November 18, 1983, in violation of Minn. Rule 9545.0340 (1983).

Based upon the foregoing Conclusions, the Administrative Law judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Human Services revoke the Family Day Care License of Paul and Corrine Abraham.

Dated this day of March, 1986.

RICHARD C. LUIS
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first

class mail.

Reported: Taped

MEMORANDUM

This action arises under Minn. Rule 9545.0340 (1983), which provides, in part, as follows:

FDC applicants should be kind and responsible people with a genuine liking for children. They shall possess consistent and healthy methods for handling the life style unique to their families \dots .

Satisfactory Compliance:

An FDC license shall not be issued where any person living in the household has any of the following characteristics:

A. a conviction for, admission of, or substantial evidence of child battering or child abuse or child molesting;

Under Minn. Stat. 626.556, subd. 2(a) (1983):

Sexual abuse means the subjection to any act which constitutes a violation of sections..... 609.344, or 609.345 - - -

Minn. Stat, 609.344 (1982) defines criminal sexual conduct in the third degree:

A person is guilty of sexual criminal conduct in the third degree..... if he engages in sexual penetration with another person and any of the following circumstances exists:

(b) The complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant. In any such case it shall be an affirmative

defense, which must be proved by the preponderance of the

evidence, that the actor believes the complainant to be 16 years of age or older.

Sexual penetration as defined in Minn. Stat. 609.341 (1982) means:

. . . any intrusions, however slight, into the genital or $% \left(\frac{1}{2}\right) =\frac{1}{2}\left(\frac{1}{2}\right) +\frac{1}{2}\left(\frac{1}{2}$

anal opening of the complainant's body of any part of the

actor's body or object used by the actor for this purpose

. . where the act is committed without the complainant's consent, except in those cases where consent is not a defense. . . .

Minn. Stat. 609.345 (1982) defines criminal sexual conduct in the fourth degree:

A person is guilty of criminal sexual conduct in the fourth

another

degree..... if he engages in sexual contact with person and if any of the following circumstances exist:

(b) The complainant is at least 13 but less than 16 years of age and the actor is more than 48 months older than complainant or in a position of authority over the complainant and uses this authority to causes the complainant to submit. In any such case, it shall be an

affirmative defense which must be proved by a preponderance of the evidence that the actor believes the complainant to be 16 years of age or older, . . .

Sexual contact as defined in Minn. Stat. 609.34 (1982) means:

- Subd. 11 . . . any of the following acts committed without the complainant's consent, if the acts can reasonably be construed as being for the purpose of satisfying the actor's sexual or aggressive impulses, except in those cases where consent is not a defense:
- (i) The intentional touching by the actor of the complainant's intimate parts, or(ii) The touching by the complainant of the actors, the
- complainants, or anothers intimate parts effected by coercion or the use of a position of authority, or (iii) The touching by another of the complainant's intimate parts effected by coercion or the use of a position of authority, or
- (iv) In any of the cases above, of the clothing covering the immediate area of the intimate parts,

The Administrative Law Judge found that there is substantial evidence of child abuse or child molesting, a violation of Minn. Rule 9545.0340. Criminal

sexual conduct is child abuse. See, State of Minnesota v. Danielson, 377 N.W.2d 59 (Minn.Ct.App. 1985). Minnesota's Sentencing Guidelines also recognize that criminal sexual conduct is one of the "conviction offenses most

frequently found in domestic abuse and child abuse cases", Minnesota Sentencing Guidelines and Commentary, II.F.06 (Rev. Eff. 11/1/83). The definition of "molest" is: (1) To annoy, disturb or persecute, (2) to make annoying sexual advances to. Websters New Collegiate Dictionary (1979). "When the words annoy or molest are used in reference to offenses against child, there is a connotation of abnormal sexual motivation on the part of the

offender". Application of Sheridan, 40 Cal. Rptr. 894 (1964). Because L.N. was 15 years old on November 18, 1983, and did not participate willingly in the sexual encounter, but was "talked into" the encounter, the acts of Paul Abraham constitute the "molestation" contemplated by the statute.

The Legislature has stated a strong public policy of protection of children ". . . whose health or welfare may be jeopardized through physical abuse, neglect or sexual abuse . . . ". See, Minn. Stat. 626.556 (1984). Consistent with this policy, the Legislature requires the reporting of suspected sexual abuse of child by health care providers. To protect maltreated children from injury, the Child Abuse Reporting Act narrowly abrogates the statutory medical privilege. One such form of injury is sexual abuse. See, State v. Odenbrett, 349 N.W.2d 265 (Minn. 1984).

Paul Abraham has not been convicted of, nor has he admitted to, any crime of child abuse. However, the Local Agency has come forward with substantial evidence that multiple incidents of child abuse did occur. The Licensees did not then demonstrate compliance with the rule by a preponderance of the evidence.

Substantial evidence is generally thought of as a standard $% \left(1\right) =\left(1\right) +\left(1\right)$

review of any agency decision. Because a reviewing court may impose this burden, to avoid a potential challenge, the evidence which supports the findings must meet the requirement of substantiality. Evidence which is "substantial", creates more than a suspicion of the fact to be established.

32A C.J.S. Evidence, 1016.

Reasonable cause exists when such facts exist as would lead a person of

ordinary care and prudence to believe and conscientiously entertain honest and

strong suspicions that an act or crime occurred. Blacks Law Dictionary, 5th

Ed., p. 1138. The Local Agency does not have to prove a violation by a preponderance of the evidence (over 50%) - a lower burden is sufficient. The

statutory requirement of "reasonable cause" to find "non-compliance with rules

promulgated by the commissioner" varies depending upon the facts in each case. The "reasonable cause" standard is one usually utilized in criminal proceedings to determine whether or not sufficient cause exists to issue an

indictment or a warrant. "Reasonable cause" is synonymous with "probable cause". Probable cause exists where all circumstances provide reasonable grounds for suspicions sufficient to cause a cautious man to believe the suspect commented a wrongful act. Steinberg v. Department of Public Safety,

357 N.W.2d 413 (Minn.Ct.App. 1984).

 ${\tt L.N.}$ did not instigate the investigation into her alleged abuse. If there

had been no report of suspected abuse by Shirley Rose, the hearing process would not have started. L.N.'s description of the events of November 18 and

December 23, 1983 is consistent in her diary, depositions, police reports and

hearing testimony. John Banker, testifying for the Respondents, stated

Corrine Abraham was shopping on the morning of December 23, 1983 and L.N. stated the same.

Mr. Banker's veracity is questionable. He has been convicted of receipt

and concealment of stolen property. His testimony is weighted by a 17-year

friendship with Paul Abraham, and yet conflicts with the Abrahams' testimony.

The Abrahams denied that Corrine went shopping on the morning of December

1983 in direct conflict with their witnesses's statements. The Administrative

Law Judge can observe the demeanor of the witnesses and is able to assess the

consistency and inherent probability of their testimony. Much of the testimony from the parties to this hearing is in direct conflict. In

addition, there is conflict with the testimony of each party. But evidence

which is material to the Findings and Conclusions of this case is consistent.

The evidence indicating sexual abuse of L.N. by Paul Abraham is substantial.

The Licensees argue that there is ambiguity between the $% \left(1\right) =\left(1\right) +\left(1\right) +\left($

and L.N.'s hearing testimony. L.N. explained that her diary entries $% \left(1\right) =\left(1\right) +\left(1\right)$

always made on the day of occurrence, but were made several days later. The $\ensuremath{\text{The}}$

inconsistency in the diary is reasonable where an entry is made where this one

was, several days after the recorded event. It is not critical, in assessing

whether or not there is substantial evidence of abuse, to prove an error-free

entry in the diary.

The Licensees argue that there is no evidence other than L.N.'s sworn testimony to support her allegations. Where the burden shifts, as it does in

this case, the Respondent has the burden of coming forth, with a preponderance

of the evidence, that the allegations are not true. L.N. and her mother both

testified that on November 18, 1983, L.N. was babysitting for the Abrahams.

Whether she was actually babysitting or not is in dispute, but J.E. (L.N.'s mother) testified that L.N. was at the Abrahams' home that night. There was testimony at the hearing that L.N. was at the Abrahams' home, with Paul Abraham, after Corrine Abraham had left for the evening. Because of these circumstances, the opportunity for sexual abuse was presented, and the Licensees have not shown otherwise. The Judge observed that L.N. was a very credible witness. The Abrahams' denial of her sex encounter allegations is not convincing. Mrs. Abraham was not present at the times of the encounters, and there is no evidence to deny that fact. And, Mr. Abraham's demeanor while

testifying as he denied L.N.'s recollection of the events of November 18 and December 23, 1983, did not persuade the Judge to believe him. The Licensees have not carried their burden of showing by a preponderance of the evidence that the allegations of abuse during this time did not occur.

The Licensees argue that there is no substantial evidence to revoke this license under Minn. Rule 9502.0335, subd. 6E (1985). This is an incorrect statement of the burden under this rule, and as stated in the Prehearing Order

of October 2, 1985, Minn. Rule 9545.0340 (1983) is to be applied to this case.

Pursuant to the Repealer published at 9 State Register 2)18 on March 25, 1985, most provisions of Minn. Rules Chapter 9545 were repealed as of April 12, 1985, except for providers who were already licensed under Chapter 9545. As to those providers, the provisions of Chapter 9545 are not repealed until one year after the Notice of Adoption of Chapter 9502 was published in the State Register, Since the Abrahams were so licensed at the time of repeal, the "old" rules still applied to them at the time the Local Agency notified them of proposed revocation (June 5, 1985).

Pursuant to the effective date explanation on the same State Register page, the effective date for Chapter 9502 shall be eight days after Notice of Adoption is published in the State Register, except for providers licensed under Chapter 9545. As to those providers, Chapter 9502 shall take effect six

months after Notice of Adoption is published in the State Register, or the first date the provider's license is renewed after Notice of Adoption, whichever is later. Under this enactment, the "new" rules do not apply to the

Abrahams until January 1, 1986 (the date their license was up for renewal). Notice of the revocation in this matter was on June 5, 1985. The Notice of and Order for Hearing was issued on July 7, 1985. All of those dates are prior to any possible effective date of Chapter 9502, as it applies to the Abrahams. Therefore, only Chapter 9545 (1983) violations apply to the Abrahams.

It is concluded that revocation of the Family Day Care License in this case is necessary to insure the safety of child who would otherwise be in the Abrahams' care.

R.C.L.

'The reader will find all rules listed at 9 State Register 2118 labeled

9545 . . ., not 9502 . . . The "new" rules were renumbered from 9545 . . to 9502 . . . pursuant to a renumbering instruction issued by the Revisor of Statutes subsequent to March 25, 1985.